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No. _____

In The

Supreme Court of the United States

JOSEPH G. PASTOREK, II, M.D.,

Petitioner,

v.

MERVIN L. TRAIL, M.D., ALLEN COPING, D.D.S, SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, CAROLYN ELKINS, SURVIVING SPOUSE AND EXECUTRIX OF THE ESTATE OF THOMAS E. ELKINS, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED

1. DOES A STATE'S AUTHORITY TO REGULATE THE MEDICAL PROFESSION ALSO GIVE IT THE AUTHORITY TO DETERMINE THE CONTENT OF TESTIMONY GIVEN BY A STATE-EMPLOYED PHYSICIAN BEFORE A STATE HEARING TRIBUNAL?

2. DOES 42 U.S.C. § 1983 DOCTRINE OF GOOD FAITH IMMUNITY APPLY TO REQUESTS FOR INJUNCTIVE RELIEF?

3. SHOULD THE RULE THAT THERE IS NO *RESPONDEAT SUPERIOR* LIABILITY IN ACTIONS UNDER 42 U.S.C. § 1983 BE ABANDONED IN FAVOR OF APPLYING COMMON LAW PRINCIPLES TO ACTIONS UNDER 42 U.S.C. § 1983?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Joseph G. Pastorek, II, M.D.
   Petitioner;

2. Mervin L. Trail, M.D., et al. and Carolyn Elkins, Surviving Spouse and Executrix of the Estate of Thomas E. Elkins, Respondents;

3. Jim Waide,
   Attorney for Petitioner;

4. Norman A. Mott, III,
   Attorney for Petitioner;

5. G. Fredrick Kelly, III,
   Attorney for Respondent Estate of Thomas E. Elkins, M.D.;

6. E. John Litchfield,
   Attorney for Respondents Drs. Trail and Coping; and

7. Phyllis Guin Cancienne,
   Attorney for Respondent Board of Supervisors of Louisiana State University.

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OPINIONS BELOW

The Court of Appeals Opinion is non-reported, and is attached hereto as App. 1 through App. 13. The District Court's Opinions are non-reported, and are attached hereto as App. 14 through and App. 43.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on January 26, 2001, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1861, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(a) provides:

> The jurisdiction in civil and criminal matters conferred on the District Courts by the provisions of Titles 13, 24, and 70 of the revised statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the subject, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and Statutes of the State wherein the Court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said Courts in the trial and disposition

of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Louisiana granted summary judgment in favor of Respondents in this, First Amendment, 42 U.S.C. § 1983 suit filed by Petitioner, Dr. Joseph G. Pastorek, II, M.D. The suit sought injunctive relief reinstating Petitioner to his tenured position as a professor of medicine at the Louisiana State University ["LSU"] School of Medicine, and sought damages.[1]

FACTS

In accordance with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the facts are stated in the light most favorable to Petitioner (non-movant), and evidence favoring Respondent, which is contradicted by Petitioner's evidence, is disregarded.

In February, 1995, a state hearing tribunal (the East Jefferson General Hospital) conducted a credentialing hearing to investigate allegations that a physician, Dr.

[1] Petitioner now seeks damages only against the Respondents in the individual capacities. He does not seek relief from the decision of Court of Appeals granting Eleventh Amendment immunity to Louisiana State University, and to the Respondents in their official capacities.

Anelle Blanchard,[2] was over-utilizing certain therapies designed for high-risk pregnancy cases. Petitioner, a tenured professor of medicine at the LSU School of Medicine, as well as several other physicians at the LSU School of Medicine, had performed consultations with Dr. Blanchard concerning these procedures. Petitioner was of the opinion that Dr. Blanchard's use of these procedures complied with appropriate standards of medical care and were in the patient's best interest. Ex. 5, Vol. I, pp. 353-54, 361.

Respondent Dr. Thomas E. Elkins was chairman of the LSU Medical School Department of Obstetrics/Gynecology, where Dr. Pastorek taught.[3] Respondent Elkins directed Petitioner not to give testimony favoring Dr. Blanchard at the hearing, since Dr. Elkins believed such testimony would jeopardize the reputation of the faculty at the LSU School of Medicine. Ex. 75, p. 2, Item a;[4] Ex. 30, p. 1; Ex. 29, p. 3. Dr. Elkins feared that testimony in favor of the procedures allegedly over-utilized by Dr. Blanchard could result in a "major financial liability for LSU". Ex. 75, p. 2, Item a; Ex. 30, p. 1; Ex. 29, p. 3.

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[2] Dr. Blanchard and Petitioner had been involved in an extra-marital affair. However, this embarrassing fact is of no relevance to any of the issues presented.

[3] Dr. Pastorek is a sub-specialist in perinatology, which deals with medical care of high risk pregnancies. Ex. 59, Doc. #201, p. 42.

[4] Most cites herein to the record are to sealed exhibits which were attached to *Petitioner's Response in Opposition to Summary Judgment*. Doc. #317. Hereinafter, citations to these documents will be by exhibit number and page number of the exhibit. (*e.g.*, Ex. 4, pp. 3-4).

Because of his fears of "LSU Medical School Institutional liability", Ex. 29, p. 3, Dr. Elkins sought to assure that members of his department testified adversely to Dr. Blanchard at the hearing. T#5, ¶3;[5] Ex. 5, Vol. 1, p. 360.

Respondent Elkins sent one of his subordinates, Dr. Joseph Crapanzano, to direct Petitioner not to give testimony supporting Dr. Blanchard. T#5, ¶3; Ex. 5, Vol. 1, p. 360. At Dr. Elkins' direction, Dr. Crapanzano instructed Petitioner that he must not contradict testimony of other professors of the LSU Medical School, who were expected to be critical of Dr. Blanchard. Ex. 5, Vol. 1, p. 353.

Dr. Elkins, himself, advised Petitioner that he should recant any consultations with Dr. Blanchard. Respondent Elkins told Petitioner that if he did not testify that his consultations for Blanchard were "misguided", he (Petitioner) would be terminated. On the other hand, Respondent Elkins promised that if he complied with the directions to disassociate himself from Dr. Blanchard's medical practices, there would be no termination proceedings initiated against him. T#6; Ex. 88, pp. 329-32, 407, 409.

When Petitioner refused to give false testimony at Dr. Blanchard's hearing, Elkins immediately contacted the University attorney and informed him that he (Elkins)

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[5] Documents referenced herein to the Record are denoted by their tab number, paragraph number and/or page number (*e.g.*, T#1, ¶3).

intended to initiate termination proceedings. Ex. 4, Vol. II, pp. 11-12. Three days after Petitioner refused to agree to Elkins' directions that he refrain from giving testimony in support of Blanchard, Elkins notified Petitioner he should "resign" his tenured position and leave the state, or he would be terminated. Ex. 17.

When Petitioner refused to resign, termination proceedings were initiated against him, accusing him of "insubordination", and "substandard medical care" by acting as a consultant to Dr. Blanchard. Ex. 9, Ex. 40. Following various hearings, Ex. 53, Ex. 39, Petitioner was terminated. Ex. 44.

Petitioner then commenced this action complaining that he was terminated for exercise of his First Amendment rights by refusing to falsify his true opinion of Dr. Blanchard's work, and that his due process rights had been violated.[6]

Petitioner sought damages and injunctive relief reinstating him to his tenured faculty position. Doc. #1. The District Court granted summary judgment for Respondents, App. 23-25, 42-43, and the United States Court of Appeals for the Fifth Circuit affirmed. App. 13.

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[6] Petitioner's due process claim was based upon his evidence that Respondents had informed the committee hearing the termination charges against Petitioner of alleged incidents of misconduct by Pastorek, outside Petitioner's presence, and without his knowledge. Petitioner did not learn of the scandalous charges made against him until after the due process hearings were over. App. 23. Mindful of this Court's heavy docket, Petitioner does not request this Court's review of the Court of Appeals rejection of his due process claims.

In upholding the dismissal of Petitioner's First Amendment free speech claims, the Fifth Circuit cited only a single case, and reasoned:

> The State's interest in regulating the speech of its employees is significantly different than its interest in regulating the speech of its citizens. *See Daly v. Sprague*, 742 F.2d 896, 898 (5th Cir. 1984). A state operated hospital has the "right and duty" to regulate the conduct of its physicians. *Id.* Reasonable restrictions on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved. *Id.*

App. 11.

Besides suing Respondent Elkins for free speech violations, Petitioner also made claims of retaliation and due process violations against Respondent Trail. The Fifth Circuit dismissed these claims on the following ground:

> Since Trail's liability is predicated upon the Doctrine of *respondeat superior*, rather than his own acts of omissions, Trail is not liable under § 1983.

App. 12.

Additionally, the Fifth Circuit held the individual Defendants were entitled to qualified immunity. App. 10-13. In so holding, the Fifth Circuit implicitly held that the "qualified immunity doctrine" extends even to suits for injunctive relief; i.e., Petitioner's claim for reinstatement.

REASONS FOR GRANTING CERTIORARI

REASON I.

THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER A STATE'S AUTHORITY TO REGULATE THE MEDICAL PROFESSION ALSO GIVES IT THE AUTHORITY TO CONTROL THE CONTENT OF A STATE-EMPLOYED PHYSICIAN'S TESTIMONY BEFORE A STATE HEARING TRIBUNAL.

> For at least fifteen years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of speech. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980).

Connick v. Meyers, 461 U.S. 138, 142 (1983).

However, the Justices of this Court have often disagreed about the limitations a state may impose on a state employee's free speech rights. *Pickering v. Board of Education*, 391 U.S. 563 (1968) held that the state's authority to regulate an employee's speech must be determined by arriving "at a balance between the interest of an employee as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." Applying such a "balancing" test, *Pickering* held it unlawful to discharge a school teacher for speaking out on the issue of how "funds

allocated to the operation of the school should be spent". 391 U.S. at 572.

However, *Connick v. Meyers*, 461 U.S. 138 (1983), held it not a violation of the First Amendment for the state to discharge an assistant district attorney because she had distributed a questionnaire concerning internal office affairs. *Connick* characterized the speech as being not of any "public interest", 461 U.S. at 147, and held that "personal interest" in speaking about an employee grievance does not require that (the employer) "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Connick*, 461 U.S. at 139. Four Justices dissented complaining the result would be to "invariably . . . deter public employees from making critical statements about the manner in which government agencies are operated", and would "deprive the public . . . of valuable information". 461 U.S. at 170.

Waters v. Churchill, 511 U.S. 661 (1994) returned to this issue. A four-Justice plurality in *Waters* held that a public employee could be discharged if the employer reasonably believed, following a "reasonable" investigation, that an employee had made statements which would be "disruptive". The four-Justice plurality reversed the District Court's grant of summary judgment for the employer because:

> A reasonable fact-finder might therefore, on this record, conclude that petitioners actually fired Churchill not because of the disruptive things

> she said . . . , but because of non-disruptive statements about cross-training . . .

511 U.S. at 682.

Again, *Waters* reflects differing opinions among the members of this Court, since Justice Scalia accused the plurality of improperly adding "a requirement that the employer conduct an investigation before taking disciplinary action". 511 U.S. at 686. Justice Scalia also accused the plurality of recognizing an unprecedented "broad new First Amendment procedural right". *Id.*

With this Court's Justices disagreeing over the extent to which an employee has the right to speak, without being fired, it is unsurprising that the Courts of Appeals have also taken differing approaches. The approach most limiting an employee's free speech right is exemplified by the Fifth Circuit's holding in this case. This case involves no claim that Petitioner had demoralized his fellow employee physicians, or that his opinions about the medical procedures used by a colleague caused him to be an inefficient professor of medicine. Instead, Petitioner was discharged because his opinions might embarrass the University, and particularly its department head, Respondent Elkins, if it were determined that the faculty members of the University were aligned with a physician against whom disciplinary charges had been brought. According to the Fifth Circuit, the state's authority to regulate a profession is all that is needed to restrict the speech of members of that profession.

This restrictive view of free speech rights is consistent with the Fifth Circuit's earlier decision, *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991) *(en banc)*, which

upheld a grant of summary judgment against an anesthesiologist, whose staff privileges had been terminated, after he accused other physicians at the respondent public hospital of affording a "monopoly" to certain other anesthesiologists, and of limiting the right of patients to choose their own physicians. A vigorous dissent accused the majority of "result-oriented decision making (which would) erode respect for the federal judiciary". 943 F.2d at 1422.

In dismissing Petitioner's case, the Fifth Circuit relied upon *Daly v. Sprague*, 742 F.2d 896 (5th Cir. 1984), which took a restricted view of the First Amendment. *Daly* upheld removal of clinical privileges because of a physician's speech, concluding that public hospital authorities should have the authority to control physicians' speech, just as this Court had approved granting school authorities the broad authority to regulate education, even though free speech rights of the employees had been implicated. *See Board of Education v. Pico*, 457 U.S. 853, 863-64 (1982).

The Fifth Circuit's restricted view of First Amendment rights (holding speech subordinate to the state's right to regulate a profession, even without a showing of a detrimental effect on employee morale) is inconsistent with the broad protection given to public employee First Amendment rights by other courts of appeals.

Contrasting with the Fifth Circuit's narrow view of an employee's right to free speech, *Melton v. City of Oklahoma*, 879 F.2d 706 (10th Cir. 1989) held that a police officer could not be terminated for testifying on behalf of a criminal defendant, even though such testimony might

cause disruption and morale problems among his fellow officers. The Tenth Circuit stated:

> (Plaintiff)'s interest in testifying at trial is so strong . . . that any disruption or impairment of the enterprise would have to be extreme in order to justify preventing trial testimony.

879 F.2d at 714.

The Fifth Circuit's approach is also inconsistent with *Pro v. Donatucci*, 81 F.3d 1283 (3rd Cir. 1996). Notwithstanding the obvious effects upon working relationships, the Third Circuit held that the Registrar of Wills of Philadelphia County could not retaliate against a clerk in his office, because the clerk appeared to testify against the Registrar in a divorce proceeding. Remarkably, *Pro* relied upon older Fifth Circuit Court of Appeals authority, which had held "that a public employee's truthful testimony receives constitutional protection regardless of its content."[7] 81 F.3d at 1288. The Third Circuit admitted,

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[7] Contrasting with its current view, the Fifth Circuit once agreed with the view of the Tenth Circuit. *Johnston v. Harris Co. Flood Control District*, 869 F.2d 1565 (5th Cir. 1989) held a public employee had a near absolute right not to be penalized for testimony, writing: "When an employee testifies before the official governmental adjudicating or fact-finding body who speaks in the context that is inherently of public concern . . . we would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state. If employers were free to retaliate against employees who provide truthful, but damaging, testimony about their employers, that would force the employees to make a difficult choice. Employees could either testify truthfully and lose their job, or could lie to protect their job security. Those unwilling or unable to risk unemployment would scuttle our efforts to arrive

however, that its approach was inconsistent with some circuits, stating: "We recognize that our holding may be somewhat inconsistent with opinions of the Courts of Appeals for the Fourth and Seventh Circuits." 81 F.3d at 1291.

Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992) held it a violation of the First Amendment to terminate an employee because she expressed an intent to assist a subordinate with a race discrimination claim. *Piver v. Pender County Board of Education*, 835 F.2d 1076 (4th Cir. 1987), held it unlawful to take disciplinary action against a high school teacher who spoke out in favor of tenure for his principal. *Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993) held that it contravenes "clearly established law" to fire attorney/employees because they defended the professional competence of fellow attorneys who had filed discrimination suits. *Marshall*, *Patrick*, and *Piver* all conflict with this case.

In the end, the Fifth Circuit has embraced a rule quite dangerous to the exercise of free speech. This rule is that the mere power of the state to regulate a profession entitles it to control the opinions of persons in that profession, even to the extent of keeping them from expressing their opinions at a public hearing. This is far different from the Tenth Circuit's view. As recently stated in *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000):

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at the truth . . . " *Johnston*, which is in obvious conflict with this case, was not cited in this case.

> In stating that the disruption of the workplace must be 'extreme' in order to outweigh the employee's interest in giving truthful testimony, *Melton*[8] imposes a somewhat higher burden on employers than the decisions in other Circuits.

219 F.3d at 1207.

The idea that the state's authority to regulate a learned profession justifies restrictions on the speech of the members of that profession was rejected by this Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). *Zauderer* held that the state's authority to regulate lawyers did not extend to prohibiting truthful commercial speech. Lawyers' truthful commercial speech was held important by this Court, because otherwise, citizens would be denied accurate information about legal matters. This Court said:

> The state is not entitled to interfere with that access (of citizens to the courts) by denying its citizens accurate information about their legal rights.

471 U.S. at 643.

The State of Louisiana now claims the authority to deny citizens access to medical information even though *Zauderer* holds they cannot be denied access to legal information.

If the state may determine what medical opinions a physician may express, it has the authority to end public debate of important issues. The wisdom of many medical

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[8] *Melton v. City of Oklahoma*, 879 F.2d at 714-15.

procedures is a source of debate among physicians.[9] If the State of Louisiana may prescribe for its physicians what they may say concerning appropriate therapies for the treatment of high-risk pregnancies, the State of Louisiana may deny to the public information which it should have to make an informed decision regarding medical procedures. The State of Louisiana's restrictions on free speech may save the department head at LSU School of Medicine embarrassment, but does so at the cost of depriving the public of valuable medical opinions. This is a price which the First Amendment does not require the citizens of Louisiana, or the Petitioner, to pay.

REASON II.

THE WRIT SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT HAS DECLINED TO FOLLOW CONTROLLING AUTHORITY FROM THIS COURT THAT THE QUALIFIED IMMUNITY DEFENSE DOES NOT APPLY TO REQUESTS FOR INJUNCTIVE RELIEF.

Damages was only one part of Petitioner's claim. Petitioner's main claim was his desire to be reinstated to

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[9] Physicians are not in agreement, for example, as to the wisdom of the use of diskograms for a determination of the existence of back pain; whether the prescription drug Viagra is a suitable measure to cure the sex-ills of the aged; whether it is appropriate to prescribe marijuana to counter the effects of chemotherapy for cancer patients; whether the use of Prozac is appropriate to treat mild cases of depression; whether the use of narcotics is appropriate to treat non-cancer related pain; and whether chiropractic procedures are appropriate medical practices or quackery.

his tenured position as a professor at the LSU School of Medicine. The Fifth Circuit, in dismissing the action, relied upon the qualified immunity defense, making no distinction between Petitioner's claim for damages, and his claim for injunctive relief. The Fifth Circuit wrote:

> A public official loses qualified immunity when (1) his actions violate a constitutional right, (2) that was *clearly established* at the time of the violation, (3) his conduct was *objectively unreasonable*. Appellant's claim fails because neither Trail nor Elkins violated these clearly established constitutional rights.

App. 7.

In so holding, the Fifth Circuit Court of Appeals' Opinion ignores the unanimous jurisprudence that the doctrine of qualified immunity applies only to claims for damages, and not to claims for injunctive relief. *Wood v. Strickland*, 420 U.S. 308, 314, n.6 (1975); *Behrens v. Pellatil*, 516 U.S. 299, 116 S.Ct. 834, 842 (1996) (stating that "clearly established right need not be alleged when injunctive relief sought"); *Allen v. Coughlin*, 64 F.3d 77 (2nd Cir. 1995); *Flynn v. Sandahal*, 58 F.3d 283 (7th Cir. 1995); *D'Aguanno v. Gallagher*, 50 F.3d 877 (11th Cir. 1995); *Edwards v. Wallace Community College*, 49 F.3d 1517, 1524, n.9 (11th Cir. 1995); *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993); *Wheaton v. Webb-Petett*, 931 F.2d 613, 620 (9th Cir. 1991) (stating that "we are permitting § 1983 plaintiffs to seek respective injunctive relief against state officials who have personal immunity from damages"); *Chrissy F. by Medley v. Mississippi Dep't of Public Welfare*, 925 F.2d 844, 849 (5th Cir. 1991); *Pace v. Moriarty*, 83 F.3d 261, 263 (8th Cir. 1996).

In view of this unanimous line of authorities, the Fifth Circuit's dismissal of the reinstatement claim on grounds of qualified immunity calls for this Court to grant certiorari to exercise its supervisory authority over the Fifth Circuit to see that it follows principles of undisputed law.

REASON III.

THE WRIT SHOULD BE GRANTED IN ORDER TO OVERRULE THE *MONELL V. DEPARTMENT OF SOCIAL SERVICES*, 436 U.S. 658 (1978) HOLDING THAT COMMON LAW PRINCIPLES OF *RESPONDEAT SUPERIOR* LIABILITY DO NOT APPLY IN ACTIONS UNDER 42 U.S.C. § 1983.

In order to obtain equitable relief because of the violation of his free speech rights, Petitioner needed an injunction directing Respondent Trail and the Board of Supervisors to reinstate him. These Respondents defended on the grounds that they acted only on the basis of the recommendation of their subordinate (Dr. Elkins) and did not personally make any decision because of exercise of First Amendment rights.

The Court of Appeals accepted this defense, holding:

> "Liability under section 1983 cannot be predicated upon the vicarious liability doctrine of *respondeat superior*. *See Id.* Since Trail's liability is predicated upon the doctrine of *respondeat superior* rather than upon his own acts or omission, Trail is not liable under section 1983."

App. 12.

Thus, even if Petitioner's testimony was caused by exercise of free speech rights, Petitioner could not be reinstated, since the individual (Dr. Elkins) who retaliated on grounds of exercise of free speech, is not actually the person who made the termination decision.

Monell v. Department of Social Services, 436 U.S. 658 (1978) held that since Congress, when it debated 42 U.S.C. § 1983 (Civil Rights Act of 1861), doubted its authority to hold municipalities liable for misconduct of their citizens, Congress did not intend to sanction *respondeat superior* liability. *Id.* This result is perverse, since *respondeat superior* relates to a master's liability for the acts of his servant, and has nothing to do with a municipality's liability for acts of its inhabitants. (*e.g., Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)). Additionally, *Monell* conflicts with 42 U.S.C. § 1988(a), which incorporates principles of the "common law" into 42 U.S.C. § 1983.

Most significantly, the confusing distinctions that have been drawn by the hundreds of court decisions attempting to define when an entity is liable for an activity other than its own personal involvement in a constitutional violation has caused four members of this Court to call for a re-examination of the *Monell* rule of non-*respondeat superior* liability. *Board of County Commissioners v. Brown*, 420 U.S. 397 (1997).[10]

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[10] Four dissenting Justices, speaking through Justice Breyer, noted in *Brown* that this Court's 42 U.S.C. § 1983 "respondeat liability" jurisprudence:

(1) distinguishes between municipal actions that "itself" violates federal law, an action that intensely deprives a plaintiff

In this case, Respondent Trail recommended Petitioner be discharged based on the recommendation of his subordinate, Dr. Elkins, and Dr. Elkins was retaliating against Petitioner for exercise of his First Amendment rights. Whether this gives rise to liability of Dr. Trail, at least for injunctive relief reinstating Petitioner to his employment, should be decided by the many litigated principles of "common law", rather than by the confusing rules that have developed in lieu of the common law principle of *"respondeat superior"* liability. Congress, in adopting 42 U.S.C. § 1988(a), has expressly required consideration of common law principles when deciding cases under 42 U.S.C. § 1983. *Robertson v. Wegmann*, 436 U.S. 584 (1978) (applying state survivorship rules in civil rights case); *Wilson v. Garcia*, 471 U.S. 261 (1985) (applying state statute of limitations in civil rights case).

Additionally, the fact that common law principles are uniformly applied in other areas of statutory construction when a federal statute does not expressly address an area is well recognized. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (using common law principles in

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of a federally protected right, and one that has caused an employee to do so." 117 S.Ct. at 1401;

(2) distinguishes "between an exercise of policy making authority and an exercise of delegated discretionary policy-making authority". 117 S.Ct. at 1403;

(3) requires courts to decide whether a failure to make policy was "deliberately indifferent" rather than "grossly negligent". 117 S.Ct. at 1403; and

(4) "and they must decide whether it matters that some such failure occurred in officer training, rather than officer-hiring process." *Id.*

deciding cases under the Civil Rights Act of 1964); *Rosenthal & Co. v. Commodity Futures Trading Com'n*, 802 F.2d 963 (7th Cir. 1986) (applying common law principles to actions under Commodity and Exchange Act); *Hamilton v. Carell*, 2001 W.L. 276977, ___ F.3d ___ (6th Cir. 2001) (applying common law principles in ERISA suits). It is not logical to assert that Congress, in adopting 42 U.S.C. § 1983, doubted its power to utilize common law principles of *respondeat superior* liability, but when enacting all other statutes, has the power to use these principles. The four Justices that dissented in *Brown* were correct, and the Court should grant certiorari, to overrule *Monell* in favor of application of common law principles of *respondeat superior*.

CONCLUSION

Petitioner prays that this Writ of Certiorari be granted to resolve important issues under the First Amendment and 42 U.S.C. § 1983.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30317

JOSEPH G. PASTOREK, II, M.D.,
Plaintiff-Appellant,

v.

MERVIN L. TRAIL, M.D., ET AL,
Defendants,

MERVIN L. TRAIL, M.D., ALLEN COPPING, D.D.S., SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Defendants-Appellees.

No. 99-31146

JOSEPH G. PASTOREK, II, M.D.,
Plaintiff-Appellant,

v.

MERVIN L. TRAIL, M.D., ET AL,
Defendants,

CAROLYN ELKINS, SURVIVING SPOUSE AND EXECUTRIX OF THE ESTATE OF THOMAS E. ELKINS, M.D.,
Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana,
New Orleans Division
(97-CV-3040-S)
(Filed Jan. 26, 2001)

Before BARKSDALE AND BENAVIDES, Circuit Judges and VELA[1], District Judge.

PER CURIAM:[2]

This case arises out of the termination of Dr. Joseph G. Pastorek ("appellant") from the Louisiana State University Medical School ("LSUMS"). Appellant was a tenured professor at LSUMS in the Obstetrics-Gynecology Department. He specialized in the treatment of high-risk pregnancies and, in addition to teaching at LSUMS, appellant performed consultations on patients referred to him by Dr. Annelle Blanchard ("Blanchard"), a local obstetrician. In February of 1995, the East Jefferson General Hospital held credentialing hearings to investigate allegations that Blanchard was harming obstetrics patients by over-utilizing high-risk procedures. Dr. Thomas E. Elkins ("Elkins"), chair of the Obstetrics-Gynecology Department and appellant's immediate supervisor, encouraged appellant to stop participating in supporting Blanchard's practices, but he refused.

On March 29, 1995, Elkins sent a formal letter of complaint to LSUMS's chancellor, Dr. Mervin L. Trail ("Trail"). In the letter, Elkins recommended that Trail commence termination proceedings against appellant on the ground that appellant repeatedly refused to discontinue high-risk obstetric consultations.

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[1] District Judge of the Southern District of Texas, sitting by designation.

[2] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Trail informed appellant of the charges and provided him a copy of Elkins' complaint. Trail suspended appellant's obstetrics privileges but allowed him to continue teaching and practicing gynecology. Trail appointed an ad hoc committee to review the charges. This committee asked Dr. Gary Cunningham of the Southwestern Medical Center to conduct an independent review. Dr. Cunningham concluded that appellant engaged in "very questionable obstetrical practices." Based on Dr. Cunningham's conclusion, the committee recommended further investigation. Trail requested an independent review by the American College of Obstetricians and Gynecologists ("ACOG"). The ACOG found that, of the nineteen consultations it reviewed, sixteen were unsatisfactory because of inadequate documentation and two clearly fell below the standard of care required of a physician. Following the ACOG's review, Trail terminated appellant's employment. Appellant appealed this decision to the Dean of LSUMS, the LSUMS Standing Appeals Committee, and the President of Louisiana State University. He lost each appeal but claims that the hearings were biased against him. The LSU Board of Supervisors ("LSU Board") ratified the decision to terminate on August 22, 1997.

Appellant filed suit under 42 U.S.C. §§ 1983 and 1985 against the LSU Board, Trail and President Copping in their official capacities, Trail in his individual capacity and Elkins in his individual capacity. Appellant seeks damages and injunctive relief for violations of his due process rights under the Fourteenth Amendment and his speech and association rights under the First and Fourteenth Amendments. The district court granted summary

judgment in favor of the LSU Board and Chancellor Trail and President Copping in their official capacities based on Eleventh Amendment sovereign immunity. It granted summary judgment in favor of Trail and Elkins in their individual capacities based on qualified immunity. Appellant challenges these grants of summary judgment.

I.

This Court reviews a grant of summary judgment *de novo*, applying the same standard of review as the district court. *See Merritt-Campbell, Inc. v. RXP Products, Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). Summary Judgment is appropriate where there is not a genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See id.* This Court makes all inferences and resolves all factual disputes in favor of the non-movant. *See id.*

II.

The district court held that the Eleventh Amendment bars appellant's claims against the LSU Board. Appellant contends that Eleventh Amendment immunity does not extend to state agencies like the LSU Board. The Eleventh Amendment bars suits in federal court by citizens of a state against their own state or another state. U.S. CONST. amend. XI; *Hans v. Louisiana*, 132 U.S 1, 11, 10 S.Ct. 504, 505 (1890). Further a plaintiff cannot avoid this sovereign immunity bar "by suing a state agency or arm of a State" where the State is the real party in interest. *Richardson v. Southern University*, 118 F.3d 450, 452 (5th Cir. 1997). This

Court has recognized that "the majority of decisions concerning the Eleventh Amendment status of state universities have concluded the institutions were arms of the state" and immune from suit. *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 557 (5th Cir. Unit A 1982).

Six factors guide the determination of whether a university board is immune from suit: (1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the agency; (3) the degree of local autonomy the agency enjoys; (4) whether the agency is concerned primarily with local, as opposed to state-wide problems; (5) whether the agency has authority to sue and be sued in its own name; and (6) whether the agency has the right to hold and use property. *See Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 (5th Cir. 1991); *Richardson*, 118 F.3d at 452. In *Richardson v. Southern University*, this Court determined that Southern University's Board of Supervisors was immune from suit under the Eleventh Amendment because Louisiana law characterized the university as an "arm of the state," its funding comes from the state, its autonomy is limited, its concerns are state-wide, and the university must sue and be sued in the name of its Board of Supervisors. *Richardson*, 118 F.3d at 454-56.

Similarly, LSU is a state agency, *see* La. R.S. 36:642(B), its funding comes from the state, *see id.* at 38:2436, its autonomy is limited, *see id.* at 17:453, its concern is the education of students across the state, and LSU cannot sue or be sued in its own name, *see id.* at 17:335(A) (1), (6), (8), and (9). Therefore, the LSU Board is an "arm of the state" that enjoys Eleventh Amendment immunity, and

the district court's grant of summary judgment on this issue was proper.

III.

The district court granted summary judgment in favor of Trail and Copping in their official capacities on the ground that the 11th Amendment bars appellant's suit. The Eleventh Amendment bars suit in federal court against state officials in their official capacities when "the State is the real substantial party in interest." *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). The State is the real substantial party in interest where the judgment would be satisfied out of the state treasury. *See Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986). For example, in *Voisin's Oyster House, Inc. v. Guidry*, this Court held that the Eleventh Amendment barred plaintiff's claim against the Secretary of the Louisiana Department of Wildlife and Fisheries in his official capacity because the judgment, under Louisiana law, would be satisfied out of the state treasury. *Id.*

As in *Voisin's Oyster House*, a judgment against Trail or President Copping in their official capacities must be paid out of the state treasury under Louisiana law. *See* La. Const. art. 12, § 10; La. R.S. 13:5109B(2). This fact makes Louisiana the "real substantial party in interest." *Guidry*, 799 F.2d at 188. Therefore, the Eleventh Amendment bars appellant's claims against Trail and Coping [sic] in their official capacities.

Furthermore, appellant's 1983 claims for monetary damages against Trail and Copping in their official capacities are barred for an additional and independent reason. Section 1983 authorizes suit against a "person" to remedy civil rights violations. *See* 42 U.S.C. § 1983. In *Will v. Michigan Department of State Police*, the Supreme Court held that a state employee acting in his or her official capacity is not a "person" within the meaning of that term under section 1983. 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989). Here, appellant's 1983 claim for money damages is against two state employees, Trail and Copping, in their official capacities. Therefore, summary judgment on Appellant's 1983 claims against Trail and Copping in their official capacities was appropriate because they are not "persons" under section 1983. *See id.*

IV.

Appellant contends that Trail and Elkins, in their individual capacities, violated his constitutional rights (1) to procedural due process, (2) to substantive due process, (3) to free speech, and (4) by conspiring to violate these rights. Trail and Elkins raised the defense of qualified immunity which shields government officials from individual liability for civil damages. *See Coleman v. Houston Ind. School Dist.*, 113 F.3d 528, 532 (5th Cir. 1997). A public official loses qualified immunity when (1) his actions violate a constitutional right, and (2) that was *clearly established* at the time of the violation, and (3) his conduct was *objectively unreasonable*. Appellant's claims fail because neither Trail nor Elkins violated any of his clearly established constitutional rights.

A.

Appellant argues that the termination proceedings did not afford him procedural due process. Specifically, appellant argues that Trail and Elkins did not give him notice of the "actual reasons" for his termination and that the termination hearing was biased.

Appellant alleges that he was denied due process because he did not have an opportunity to respond to "the reasons which actually motivated Dr. Trail" to terminate him. In *Levitt v. University of Texas at El Paso*, this court articulated the due process protections to which a tenured professor is entitled. 759 F.3d 1224, 1228 (5th Cir. 1985). Included among these protections is the professor's right to "be advised of the cause for his termination in sufficient detail so as to enable him to show any error that may exist." *Id.* This notice requirement is satisfied when a professor receives "notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495 (1985).

Prior to terminating appellant, Trail sent a letter informing him of the decision to institute termination proceedings. The letter informed appellant of the charges and requested a written response. These facts are not disputed. This procedure gave appellant notice of the charges and an opportunity to tell "his side of the story." Therefore, Appellant received the notice and opportunity to be heard that due process requires.

Appellant also argues that the hearing he received was biased because a lawyer participated as an advisor both in drafting the initial charge letter and in the subsequent hearings. Before being terminated, a tenured professor is entitled to a hearing before a tribunal that possesses "an apparent impartiality toward the charges." *Levitt*, 759 F.2d at 1228. However, partiality is not established by the fact that someone participated in the hearing and in the initial investigation. *See Duke v. North Texas State University*, 469 F.2d 829, 834 (5th Cir. 1972). For example, in *Duke v. North Texas State University*, this Court rejected plaintiff's argument that the hearing was biased simply because some of those who sat on the panel also participated in the charging phase of the termination proceedings. *See id.* Similarly, appellant argues that the participation of an attorney in the charging and hearing phases of the termination proceedings made the hearing biased against him. Just as in *Duke*, such participation does not constitute partiality, particularly where, as here, the allegedly partial individual did not participate in the actual decision to terminate. Summary judgment against appellant on his procedural due process claims was appropriate.

B.

Appellant argues that Trail and Elkins violated his substantive due process rights by terminating him without cause. To succeed with a substantive due process claim, the public employee must show: (1) that he had a property interest in his employment and (2) that the employer's termination of that interest was arbitrary or capricious. *See State of Texas v. Walker*, 142 F.3d 813, 819

(5th Cir. 1998). Neither the Supreme Court nor this Court has squarely decided the issue of whether faculty tenure is a property right. *See id.* Assuming it is, appellant's substantive due process claim nevertheless fails because neither Trail's or Elkins' actions were arbitrary or capricious.

A public employer's termination of an employee does not violate substantive due process unless the determination "so lacked a basis in fact that their decision to terminate him was arbitrary or capricious, or taken without professional judgment." *Id.* The fact that reasonable minds could disagree on the propriety of the decision is insufficient to defeat a public official's qualified immunity. *See id.*

In this case, Dr. Gary Cunningham, a physician not associated with LSUMS, determined that appellant engaged in "questionable obstetrical practices." An independent review by the ACOG resulted in a finding that, in two cases, appellant's care fell below the standard required of a physician. The ACOG also found that appellant's performance was unsatisfactory in another sixteen cases because of inadequate medical record documentation. Appellant was provided a hearing, an opportunity to defend himself, and several appeals. Appellant may not agree with Dr. Cunningham's or the ACOG's findings, but it cannot be said that the decision to terminate him lacked a basis in fact. Further, the extensive proceedings afforded appellant show that the decision to terminate him was not made arbitrarily or capriciously. Therefore, neither Trail nor Elkins violated appellant's substantive due process rights and summary judgment in their favor on this issue was appropriate.

C.

Appellant claims that Trail and Elkins violated his free speech rights under the First and Fourteenth Amendments. Appellant argues that Elkins violated his First Amendment rights by terminating him for supporting Blanchard and that Trail is also responsible for this violation as Elkins' supervisor.

The State's interest in regulating the speech of its employees is significantly different than its interest in regulating the speech of its citizens. *See Daly v. Sprague*, 742 F.2d 896, 898 (5th Cir. 1984). A state operated hospital "has the right, and the duty," to regulate the conduct of its physicians. *Id.* "Reasonable restraints on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved." *Id.* Because the State possesses the power to regulate a doctor's non-speech and non-association activities, incidental restrictions are valid. For example, in *Daly v. Sprague*, a physician argued that his employer violated his First Amendment speech and association rights by prohibiting him from seeing his patients. *See id.* We held that any restriction on his First Amendment rights was incidental to the valid and reasonable regulation of his conduct as a physician. *See id.*

Here, Elkins told appellant that he should not support Blanchard's substandard medical practices because it would harm appellant's and the hospital's reputations. Just as in *Daly*, Elkins' directive was a regulation of appellant's professional conduct, and any restriction on speech was incident.

Appellant's only basis for holding Trail liable for violating his free speech rights is that Trail is responsible for Elkins' actions as his supervisor. As we have said, Elkins did not violate appellant's free speech rights, but, in any event, only the direct acts or omissions of government officials will give rise to individual liability under section 1983. *See Coleman v. Houston Independent School District*, 113 F.3d 528, 534 (5th Cir. 1997). Liability under section 1983 cannot be predicated upon the vicarious liability doctrine of respondeat superior. *See id.* Since Trail's liability is predicated upon the doctrine of respondeat superior rather than upon his own acts or omissions, Trail is not liable under section 1983. Therefore, the district court's decision to grant summary judgment against appellant on his free speech claims was proper.

D.

Appellant contends that he was deprived of a liberty interest in his reputation because Elkins and LSUMS failed to provide him a name-clearing hearing. A public employer may deprive its employee of a liberty interest in his reputation where it terminates him under stigmatizing circumstances without giving the employee a name-clearing hearings. *See Arrington v. County of Dallas*, 970 F.2d 1441, 1447 (5th Cir. 1992). To successfully assert this claim, a plaintiff must allege that "he was a public employee, he was discharged, that stigmatizing charges were made against him in connection with the discharge, that the charges were false, that the charges were made public, that he requested a name-clearing hearing, and that the hearing was denied". Id. In *Arrington v. County of Dallas*, this Court affirmed summary judgment against

the public employee because he failed to allege the publication element of the claim. *Id.* Similarly, appellant in the instant case has failed to allege that he ever requested a name-clearing hearing as required by *Arrington*. Therefore, summary judgment against appellant on this claim is appropriate.

E.

Appellant argues that his termination was the result of a larger conspiracy involving Trail and Elkins. A section 1983 plaintiff may assert conspiracy claims, but such a claim is not actionable without an underlying violation of section 1983. *See Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990). Where defendants are entitled to qualified immunity, the underlying violation of section 1983 required to make out a conspiracy claim does not exist. *See id.* Since Trail and Elkins are entitled to qualified immunity, there is no violation of section 1983 upon which to base conspiracy liability.

CONCLUSION

The Eleventh Amendment bars suit against the LSU Board and Trail and Copping in their official capacities. Both Trail and Elkins are entitled to qualified immunity because they did not violate any of appellant's clearly established constitutional rights. In sum, all issues presented by appellant, including those not specifically addressed in this opinion, are without merit. Accordingly, we affirm the district court's grant of summary judgment against appellant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH G. PASTOREK	**CIVIL ACTION**
VERSUS	**NO. 97-3040**
MERVIN L. TRAIL, M.D., ET AL.	**SECTION "S"**

ORDER AND REASONS

(Filed Oct. 7, 1999)

IT IS **ORDERED** that the Motion For Summary Judgment (Doc. # 393) of Carolyn Elkins, on behalf of the estate of defendant, Dr. Thomas E. Elkins, is **GRANTED** for the following reasons.

BACKGROUND

This motion for summary judgment is brought by the estate of Dr. Thomas Elkins, the sole remaining defendant in the case. The court previously dismissed the Board of Supervisors of Louisiana State University, LSU President Dr. Allen Copping, and LSU Medical School Chancellor Dr. Mervin Trail in his individual capacity, on motions for summary judgment. *See* "Order and Reasons" (Doc. # 354), February 11, 1999.

The factual background is set forth in the February order and need not be repeated. The following additional facts are relevant in this action against Dr. Elkins: Dr. Elkins (now deceased) was chairman of LSU Medical Center Department of Obstetrics and Gynecology and Dr.

Pastorek's supervisor.[1] In August 1993, Dr. Pastorek approached Dr. Elkins on behalf of Dr. Blanchard and asked for his review of some of Dr. Blanchard's charts when her practice was coming under scrutiny at East Jefferson General Hospital for excessive use of cervical cerclage procedures.[2] Dr. Elkins and Dr. Joseph Crapanzano, a fellow faculty member, reviewed the charts and wrote to Dr. Blanchard:

> We discussed those cases which seemed to have legitimate justification for the treatment you provided as well as those cases where the procedure of cervical cerclage was not indicated, in fact, contraindicated.
>
> It was apparent from review of these records that the utilization of both cervical cerclage and pump tocolysis has been out of step with expected obstetrical practice and we are not surprised that your methods have been challenged.

Dr. Pastorek also had written a letter supporting Dr. Blanchard's treatment of at least one patient and making

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[1] For purposes of the §1983-based claims, it is not disputed that Dr. Elkins was acting "under color of state law" at all pertinent times.

[2] "Cerclage" is the suturing of an "incompetent" cervix to prevent premature birth. Dr. Blanchard was also criticized for over-utilization of home uterine activity monitors and pump tocolysis (whereby anti-labor drugs were administered subcutaneously through pumps attached to the patients), and because of her substantial financial interest in the medical equipment company that provided the monitors and pumps. According to a consultation agreement, Dr. Blanchard was to receive $305,000.00 for her participation in referrals to the company.

disparaging comments about that patient for her criticism of Dr. Blanchard. The patient was later determined not to need the treatments prescribed by Dr. Blanchard and tacitly approved of by Dr. Pastorek. In addition, in 1994, Dr. Pastorek, as director of OB-GYN at University hospital, granted temporary privileges to Dr. Blanchard at University Hospital, without notifying LSU. Dr. Blanchard's full privileges at University Hospital were later denied, based upon her uncertain status at East Jefferson.

Dr. Elkins was joined as a defendant in his individual capacity in Dr. Pastorek's amended complaint which alleges:

> 9.
>
> Dr. Elkins . . . began a campaign of harassment against plaintiff, consisting of unsupported and nebulous accusations and charges, primarily regarding the medical care of certain types of patients of other physicians which plaintiff saw in perinatal consultation. . . .
>
> 10.
>
> Dr. Elkins also directed nebulous, outlandish, untrue and defamatory allegations concerning plaintiff to [other defendants]. . . .
>
> 11.
>
> Dr. Elkins threatened plaintiff with retaliation via termination procedures if plaintiff did not give false and/or misleading testimony in a peer review proceeding. . . .

12.

> Dr. Elkins . . . told plaintiff that he should resign and leave the state, or termination proceedings would be initiated against him. . . .

Dr. Pastorek argues that his amended complaint sets forth allegations that Dr. Elkins conspired with the other defendants to wrongfully deprive him of substantive (¶¶ 31 and 32) and procedural (¶¶ 39 and 40) due process rights, that Dr. Elkins conspired to cause Dr. Pastorek's dismissal in retaliation for his exercise of free speech under the First Amendment (¶ 11) and that Dr. Elkins defamed Dr. Pastorek, costing him his reputation in the medical community ((¶¶ 9 and 10). Only the First Amendment and defamation claims are unique to Dr. Elkins. It is alleged that his role was to initiate the termination proceedings by filing a complaint of Dr. Pastorek's wrongdoing with Chancellor Trail.

A. The Claims Against Dr. Elkins

1. Procedural Due Process

Dr. Pastorek alleges that he was denied procedural due process because he was not allowed to respond to "the reasons which actually motivated Dr. Trail to terminate Dr. Pastorek," allegedly information provided by Dr. Elkins concerning Dr. Pastorek's adulterous relationship with Dr. Blanchard and his prescribing for her of a large amount of narcotic drugs.[3] The court has already

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[3] Dr. Pastorek admitted to the adulterous relationship and has not denied the prescribing of drugs, though he denies the prescriptions were improper.

determined that Dr. Pastorek received all the process he was due. *See* February order, p. 13, "Procedural due process". Dr. Pastorek was afforded the opportunity to defend against the charges for which the was ultimately terminated. Viewing the evidence in the light most favorable to Dr. Pastorek, Dr. Pastorek's summary judgment evidence fails to show that Dr. Elkins violated any law that would have required affording Dr. Pastorek more procedural protections than those he enjoyed in the termination proceedings. Accordingly, the procedural due process claim against Dr. Elkins is dismissed.

2. "Substantive" Due Process

Plaintiff alleges that he "possesses, by virtue of his tenure, the right to hold his faculty position unless an actual cause for discharge exists." Whether a person has any "substantive" due process rights in his employment is unsettled. *See Ewing*, 106 S.Ct. at 511-12, and at 515 (Powell, J., concurring). While property rights derived from state law are protected by procedural due process, "substantive due process rights are created only by the Constitution." (*Id.* at 515 (Powell, J., concurring). Dr. Pastorek's interest in his tenured position is essentially created by contract with the state and "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." *Id.* at 516 (Powell, J., concurring).

However, assuming that Dr. Pastorek's had a property right protected by substantive due process under the Fourteenth Amendment, Dr. Pastorek's claim nonetheless fails. *See Levitt v. University of Texas*, 759 F.2d 1224, 1231

(5th Cir. 1985); *State of Texas v. Walker*, 142 F.3d 813, 818 (5th Cir. 1998) (assuming but not deciding that substantive due process was implicated in claim over state employment), *cert. denied*, 119 S.Ct. 865 (1999). The court has already determined that Dr. Pastorek failed to show that his termination was "arbitrary or capricious," as he must do in order to succeed in his substantive due process claim. *Walker*, 142 F.3d at 818. On the contrary, the court has determined that the decision to terminate Dr. Pastorek's employment was based in fact. Dr. Pastorek's allegations that other doctors may have also participated in consultations for Dr. Blanchard's patients does not undermine the court's previous determination that his termination was not arbitrary and capricious.[4] *Cf. Ewing*, 106 S.Ct. at 511-12, 514 (reversing lower court's finding that expulsion from academic program was arbitrary and capricious where plaintiff was only student denied second chance to take examination). Dr. Pastorek's particularly close and continued support of Dr. Blanchard's unconventional medical practices is admitted by Dr. Pastorek and clearly documented throughout the record. Dr. Pastorek fails to show that Dr. Elkins violated any law concerning substantive due process. Accordingly, the substantive due process claim against Dr. Elkins is dismissed.

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[4] In his motion for a continuance, Dr. Pastorek asserts that information about other doctors' consultations was withheld from him during the administrative proceedings.

3. Conspiracy

A plaintiff may assert conspiracy claims under §1983, but a conspiracy by itself is not actionable without an underlying violation of §1983. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1186 (5th Cir. 1990). Because Dr. Pastorek has failed to show a violation of any constitutional rights actionable under §1983, the §1983 conspiracy claim is not actionable.

Dr. Pastorek's §1985 conspiracy claim also fails. The only provision of §1985 that might arguably apply to his case is §1985(3). However, §1985(3) was not intended "to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin v. Breckenridge*, 91 S.Ct. 1790, 1798 (1971). Rather, §1985(3) requires "that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* (footnotes omitted); *Brotherhood of Carpenters v. Scott*, 103 S.Ct. 3352, 3359 (1983). Dr. Pastorek's §1985 claim fails because he does not allege that he is a member of a protected class or that a conspiracy was motivated by racial or otherwise class-based invidious discrimination. *See Brotherhood of Carpenters*, 103 S.Ct. at 3359.

Dr. Pastorek's §1986 claim is dismissed for the lack of evidence of any underlying civil rights violation.

4. First Amendment Claims: Free Speech, Free Association, Academic Freedom

Dr. Pastorek's free speech claim is that Dr. Elkins allegedly "retaliated" against him by formally recommending his termination shortly after he refused Dr. Elkins's request to "fabricate testimony" against Dr. Blanchard at her peer review hearing.

"It is beyond dispute that a state operated hospital has the right, and the duty, to regulate the conduct of its physicians. Limitations on professional conduct necessarily affect the use of language and association; accordingly, reasonable restraints on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved." *Daly v. Sprague*, 742 F.2d 896, 898 (5th Cir. 1984). When a consulting physician advocates a treatment, his speech is more than speech; it is the very practice of his profession, which the state may certainly regulate. *See Daly*, 742 F.2d at 899. *Cf. also Ohralik v. Ohio State Bar Ass'n*, 98 S.Ct. 1912, 1918 (1978) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.") (internal quotations omitted).

Dr. Pastorek's free speech claim is refuted by the evidence presented by him in support of the claim. The transcript of the February 1995 telephone conversation between Dr. Elkins and Dr. Pastorek, secretly recorded by Dr. Pastorek, shows that Dr. Elkins discussed the ongoing trouble presented by Dr. Pastorek's prior documented

support of Dr. Blanchard's marginal medical practices, and that Dr. Elkins asked if Dr. Pastorek thought Dr. Blanchard could be persuaded to admit her mistakes and accept some kind of probationary status. Dr. Elkins also urged that Dr. Pastorek reassess his support of Dr. Blanchard's practices and to concede that his support for her was "misguided" in light of the potential risks to LSU and to Dr. Pastorek's own career and reputation. There is no support for the claim that Dr. Elkins asked Dr. Pastorek to "fabricate testimony."

Dr. Pastorek's "academic freedom" and "free association" claims also fail. "Academic freedom" protects and promote the free exchange of ideas between faculty and students, but it also protects autonomous decision-making by the academic institution itself. *Ewing*, 106 S.Ct. at 514, n.12. Indeed, the Supreme Court has recognized that the decision as to "who may teach" is one of "the four essential freedoms" of a university. *Sweezy v. New Hampshire*, 77 S.Ct. 1203, 1218 (1957) (Frankfurter, J. concurring).

Moreover, there is no evidence suggesting that Dr. Pastorek was wrongly prohibited from associating with Dr. Blanchard. *Cf. Daly*, 742 F.2d at 899. The record amply demonstrates that Dr. Pastorek was discharged for his own participation in Dr. Blanchard's unconventional practices through his substandard consultations for Dr. Blanchard's patients. Dr. Pastorek's First Amendment claims fail for want of any summary judgment evidence that Dr. Elkins's conduct was proscribed by any law.

5. Damage to Reputation: §1983

Dr. Pastorek claims false statements by Dr. Elkins and others damaged his reputation. Reputation is not a property interest protected by the Constitution's guarantees of due process; thus, damage to reputation alone is not actionable under §1983. *Paul v. Davis*, 96 S.Ct. 1155 (1976). *See also Siegert v. Gilley*, 111 S.Ct. 1789 (1991). Because there is no showing of a violation of any constitutional right protected by §1983, Dr. Pastorek's claim for damage to his reputation is not actionable under §1983.

6. Damage to Reputation: Defamation

Throughout the pleadings, Dr. Pastorek makes numerous claims of damages caused by the publication of allegedly false statements about him. He has filed an action in the Civil District Court, Parish of Orleans, State of Louisiana, in which he alleges, among other things, defamation. The estate of Dr. Elkins asks this court to decline to exercise supplemental jurisdiction over these state law defamation claims. Absent any related federal claims, this court is not required to exercise supplemental jurisdiction over a state law claim. 28 U.S.C. §1367 (b)(3). The court declines to exercise its jurisdiction over plaintiff's defamation claim and orders it dismissed without prejudice. *Bass v. Parkland Hosp.*, 180 F.3d 234, 246 (5th Cir. 1999).

III. CONCLUSION

Summary judgment is granted in favor of Dr. Elkins as to all federal claims because Dr. Pastorek presents no

evidence creating any genuine issue as to any fact that is material to a constitutional violation.[5] All federal claims against Dr. Elkins are dismissed with prejudice. The court declines to exercise its supplemental jurisdiction over,

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[5] This court's February order may have gone a step too far in reaching prematurely the qualified immunity analysis rather than dismissing the claims because the facts indicate no constitutional violation. Only if a defendant did act illegally must the case proceed to the determination of whether he is immune from suit. *Pittman v. Nelms*, 87 F.3d 116, 119 (4th Cir. 1996). In *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the Court reached the qualified immunity analysis only after noting that, after discovery, the facts remained "inferential" of a constitutional violation. *Harlow*, 102 S.Ct. at 2730. However, in the present case, after discovery and after considering the plaintiff's summary judgment evidence, there simply is no evidence material to any constitutional violation. Thus, the case can be dismissed without addressing whether the law allegedly violated was "clearly established" or whether the defendant's conduct was "objectively reasonable" in light of that law. *See Pittman*, 87 F.3d at 118-19 & n.2. The key factor in this case is that there simply was "no constitutional violation, clearly established or otherwise." *Id.*, at 119, n.2.

There exists no clear explanation of the methodology of qualified immunity analysis at the summary judgment stage. Under *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), at a preliminary stage of the analysis, the plaintiff's allegations are relevant; if the plaintiff fails to *allege* a constitutional violation, the inquiry ends. *Id.* After discovery, however, the allegations themselves may no longer be determinative. *Harlow*, 102 S.Ct. at 2730; *Pittman*, 87 F.3d at 118-19. Deciding whether there is an actual constitutional violation necessarily depends on deciding what really happened. *Pittman*, 87 F.3d at 119. *See also Anderson v. Creighton*, 107 S.Ct. 3034, 3039-40 (1987). When there is no summary judgment evidence of any constitutional violation, a qualified immunity analysis is not reached. *Pittman*, 87 F.3d at 119, n.2.

and dismisses without prejudice, the remaining state law claim against Dr. Elkins.

New Orleans, Louisiana, this 6th day of October, 1999.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH G. PASTOREK	**CIVIL ACTION**
VERSUS	**NO. 97-3040**
MERVIN L. TRAIL, M.D., ET AL.	**SECTION "S"**

ORDER AND REASONS

(Filed Feb. 11, 1999)

IT IS **ORDERED** that the Motion For Summary Judgment by defendant, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("Board of Supervisors"), (Doc. #259) is hereby **GRANTED**.

IT IS **ORDERED** that the Motion For Summary Judgment by defendants, Allen A. Copping, D.D.S. and Mervin L. Trail, (Doc. #253) is hereby **GRANTED**.

BACKGROUND

Plaintiff, Joseph G. Pastorek, M.D., brings this civil rights action under 42 U.S.C. §§ 1983 and 1985 alleging that he was wrongfully terminated from his tenured faculty position at Louisiana State University Medical School. Dr. Pastorek contends that his termination resulted from a conspiracy whereby the defendants denied him his constitutional rights under the First and Fourteenth Amendments because he "would not assist Dr. Elkins by lying and by withdrawing his prior medical

consultations" for Dr. Annelle Blanchard's patients.[1] In addition to the Board of Supervisors, plaintiff has sued Allen A. Copping, D.D.S. in his official capacity as president of LSU; Mervin L. Trail, M.D. in both his official and individual capacity as chancellor of the LSU Medical Center and Thomas E. Elkins, (now deceased), the former chairman of the LSU Medical School Department of Obstetrics and Gynecology, in his individual capacity.[2] Plaintiff sues for both monetary damages and injunctive relief.

In a formal letter of complaint dated March 29, 1995, Dr. Elkins and Dr. Harvey A. Gabert, Chief of LSU Medical School's Maternal and Fetal Division in the Department of Obstetrics and Gynecology, recommended to Chancellor Trail that faculty termination proceedings be initiated to determine whether Dr. Pastorek had engaged in conduct detrimental to the fulfillment of his institutional and professional responsibilities which warranted termination for cause. The complaint called for Dr. Pastorek's termination on several grounds relating to the allegation that Dr. Pastorek's consultation files indicated in a substantial number of cases a recurring failure to observe acceptable standards of medical practice. Drs. Elkins and Gabert complained that Dr. Pastorek had repeatedly performed high-risk obstetric consultations

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[1] Dr. Blanchard was terminated by East Jefferson Hospital upon a finding that her practice patterns of care fell below the standard of care at the Department of Obstetrics and Gynecology at East Jefferson Hospital. *See Blanchard v. East Jefferson Hospital, et. al.*, No. 95-3231 (E.D.La. 1998).

[2] The estate of Dr. Elkins has not moved for summary judgment and thus remains a party to this action.

which had provided Dr. Blanchard the perinatal supervisory support to perform diagnostic therapeutic and surgical procedures without acceptably documented indications. The letter of complaint contained allegations that plaintiff failed to perform assigned duties and charged plaintiff with insubordination for refusing to comply with clear directives to discontinue these practices.

The LSU Medical Center Handbook contained the procedures governing faculty disciplinary action. On May 30, 1995, in accordance with the handbook, Chancellor Trail wrote Dr. Pastorek, informing him of the charges, providing him with a copy of the letter of complaint and requesting that plaintiff submit a written response to the charges. Chancellor Trail suspended plaintiff's obstetric privileges pending resolution of the complaint. However, Dr. Pastorek's clinical practice of general gynecology and his teaching activities were not suspended or otherwise affected.

In accordance with the handbook, Chancellor Trail appointed an *ad hoc* committee of three faculty physicians to investigate the charges. After conducting a hearing, the committee decided to obtain an independent review of the charges before rendering a decision, and hired Dr. Gary Cunningham of the Southwestern Medical Center at Dallas to report on the charges brought against Dr. Pastorek. The August 21, 1995 report by Dr. Cunningham concluded that plaintiff had engaged in "some very questionable obstetrical practices:"

> After careful review of these documents, I conclude that Dr. Pastorek indeed engaged in some very questionable obstetrical practices. These center around the use of tocolytics in pregnancy

> before 20 weeks, and in some cases, in the first trimester. There is implicit approval of HUAM (home uterine activity monitoring) and subcutaneous terbutaline therapy given by pump in some of these woman [sic]. There is also implicit approval of an inordinate number of cervical cerclage done by a community practitioner and it is difficult for me to believe that Dr. Pastorek was not aware of these excessive procedures.

After the review, the committee made its recommendations to Chancellor Trail in a report dated December 11, 1995. The committee recommended that the charges of insubordination and administrative lapses be dismissed. Although acknowledging that the insubordination charge left them "with many unresolved questions concerning the important issue of insubordination," the committee recommended dismissal of the charge because of doubts about precisely what directives were communicated to Dr. Pastorek. In addition, the committee found faculty attendance records inadequate, that the attendance issue had not been uniformly imposed on other faculty within the department or the university, and recommended dismissal of the "spotty attendance" charge. However, the committee members unanimously agreed with the findings of Dr. Cunningham that the issue of approving high-risk obstetric procedures through questionable consultation procedures with Dr. Blanchard required further review. The committee recommended another independent review by an outside agency.

Chancellor Trail adopted the findings of the committee and requested a quality review by the American College of Obstetricians and Gynecologists (ACOG), which sent a four person team to conduct a site investigation

and review of the clinical charges being brought against Dr. Pastorek. After reviewing the charges and interviewing ten individuals, the ACOG team found that of the nineteen cases reviewed, two clearly represented a level of care which fell beneath acceptable standards both in terms of management and in documentation of medical records. Only one case was found satisfactory by the team in both management and documentation. The remaining sixteen cases were considered unsatisfactory because of the lack of adequate medical record documentation.

On October 28, 1996, Dr. Pastorek was notified in writing of Chancellor Trail's decision to terminate his employment. Chancellor Trail outlined the reasons for the termination and informed plaintiff of his right to appeal, as outlined in the handbook. In the first stage of appeal to the dean's office, Dr. Pastorek submitted a list of forty items he alleged constituted "appealable issues" for review. The dean appointed Dr. Janice Latourneau to examine these issues. By letter dated December 29, 1996, Dr. Latourneau informed Dr. Pastorek of her conclusion that the record did not support Dr. Pastorek's assertions of error or warrant a recommendation to reverse Chancellor Trail's decision to terminate Dr. Pastorek.

Dr. Pastorek complained that Chancellor Trail's termination letter lacked specific reasons for Dr. Pastorek's termination. Chancellor Trail supplemented the October 28 termination letter with a letter dated January 22, 1997, in which he elaborated on the reasons. In February, 1997, after the completion of formal mediation procedures mandated by the handbook, Dr. Pastorek submitted a formal petition for appeal to Chancellor Trail, requesting

that he convene the LSU Medical Center Standing Appeal Committee, which included a representative of the American College of University Professors. After conducting a three day hearing, taking testimony from a number of witnesses and compiling a transcript which exceeded 1,000 pages, the Standing Appeal Committee unanimously found no reason to recommend opposing or modifying the decision of Chancellor Trail to terminate Dr. Pastorek.

On August 1, 1997, Chancellor Trail informed Dr. Pastorek in writing of the Standing Appeal Committee's findings, and of Dr. Pastorek's right, as outlined in the handbook, to appeal this decision to Dr. Copping, the president of LSU. By letter dated August 8, 1997, Dr. Pastorek formally appealed to Dr. Copping, outlining his reasons why Chancellor Trail's termination should not be upheld. By letter dated August 18, 1997, Dr. Copping notified Dr. Pastorek that he found nothing in the record to warrant overturning Chancellor Trail's decision. At an open meeting on August 22, 1997, the full Board of Supervisors ratified the decision to terminate Dr. Pastorek.

In considering defendants' Motions for Summary Judgment, the following issues will be addressed by the court:

1. Whether the Eleventh Amendment bars suit for both injunctive relief and for monetary damages against the LSU Board of Supervisors as an agency of the state.

2. Whether the Eleventh Amendment and 42 U.S.C. §§ 1983 and 1985 bar suit for monetary damages against Dr. Copping in his official capacity as the president of

LSU and against Dr. Trail in his official capacity as the chancellor of LSU.

3. Whether Chancellor Trail, in his individual capacity, is entitled to qualified immunity from suit for monetary damages.

STANDARD OF REVIEW

A party is entitled to summary judgment upon a showing that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82 (1992); Fed.R.Civ.P. 56(c). In making its determination as to whether summary judgment is appropriate, the Court must draw all justifiable inferences in favor of the non-moving party. *Anderson*, 106 S.Ct. at 2513; *Oliver Resources PLC v. International Finance Corp.*, 62 F.3d 128, 130 (5th Cir. 1995). To oppose a motion for summary judgment, the non-movant cannot rest on mere allegations or denials but must set forth specific facts showing that there is a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-53 (1986); *Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc.*, 55 F.3d 181, 184 (5th Cir. 1995); Rule 56(e). A material fact is any fact "that might affect the outcome of the suit under the governing law." *Anderson*, 106 S. Ct. at 2510. If the opposing party bears the burden of proof at trial, the moving party does not have to submit evidentiary documents to properly support its motion, but need only point

out the absence of evidence supporting the essential elements of the opposing party's case. *Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

BOARD OF SUPERVISORS' IMMUNITY

In *Scott v. Board of Supervisors*, 336 F.2d 557 (5th Cir. 1964), the Fifth Circuit held that the LSU Board of Supervisors is a "state agency" immune under the Eleventh Amendment from suit. In making this determination, the Court found that the Louisiana constitution specifically extended immunity from suit to some of its "special agencies," including the "Board of Supervisors of Louisiana State University and Agricultural and Mechanical College." La.Const. art. XIX, § 26(6).

In addition, every court in this District which has considered this issue has held that the LSU Board of Supervisors is entitled to Eleventh Amendment immunity. *See e.g, Adamo v. Board of Supervisors*, No. 93-4297, 1994 WL 202368 (E.D. La. May 16, 1994) (Sear, J.) (as a matter of law, a suit against the Board of Supervisors is effectively a suit against the State of Louisiana); *Schuth v. Louisiana State University Medical Center*, No. 87-4191, 1989 WL 65566 (E.D. La. June 15, 1989) (Schwartz, J.) (dismissing plaintiff's §§ 1983 and 1985 claims against the LSU Medical Center and Board of Supervisors as barred by the Eleventh Amendment); *Dennis v. Louisiana State University Medical Center*, No. 92-2669, 1992 WL 300798 (E.D. La. October 7, 1992) (Sear, J.) (same); *Marino v. Louisiana Board of Supervisors*, No. 96-1689, 1997 WL 358141 (E.D. La. June 25, 1997) (Wilkinson, Magistrate Judge) (same).

It is settled law that the LSU Board of Supervisors is a "state agency" immune from suit under the Eleventh Amendment. The Eleventh Amendment bars suit against a state entity regardless of whether money damages or injunctive relief is sought. *Cory v. White*, 102 S.Ct. 2325 (1982). The defendant LSU Board of Supervisors' Motion for Summary Judgment is **GRANTED**.

OFFICIAL CAPACITY IMMUNITY

The scope of the Eleventh Amendment is not limited to suits that name a state entity as a defendant. The Eleventh Amendment bars suit against state officials when "the state is the real substantial party in interest." *Voisin's Oyster House*, 799 F.2d 183, 187 (5th Cir. 1986), quoting, *Pennhurst State School and Hospital v. Halderman*, 104 S.Ct. 900, 908 (1984). "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id.*, quoting, *Pennhurst*, 104 S.Ct. at 908 n.11. Thus, to the extent a judgment against a state official, sued in his official capacity, would be satisfied out of the state treasury, the suit is barred by the Eleventh Amendment. *Voisin*, 799 F.2d at 187.

Dr. Copping is the president of LSU and Dr. Trail is the chancellor of LSU Medical Center. They argue that because they were sued in their official capacities as employees of the state, the suit is, in effect, one against the state and is therefore barred by the Eleventh Amendment. As employees of LSU the defendants are state

employees. Under Louisiana law, a judgment against either Drs. Copping or Trail, sued in their official capacities, would be satisfied out of the state treasury. La. Rev. Stat. §§ 13:5108.1 and 13:5108.2 (West Supp. 1986). Therefore, plaintiff's suit against Drs. Copping and Trail, in their official capacities, is, in effect, a suit against the state and is barred by the Eleventh Amendment.

In addition, all claims asserted by plaintiff under §§ 1983 and 1985 for monetary damages against the individual defendants in their official capacities are also dismissed. The Supreme Court has held that state employees, acting in their "official capacities," are not "persons" for the purposes of § 1983. *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2312 (1989). In so holding, the Court reasoned that a "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office [and] [a]s such [ ] is no different from a suit against the state itself." *Id.* at 2312. This holding has been extended to suits brought under 42 U.S.C. § 1985. *Santiago v. New York State Dept. of Corr. Servs.*, 945 F.2d 25 (2d Cir. 1991).

All claims for monetary damages against Dr. Copping and Chancellor Trail in their official capacities are dismissed. Defendant's Motion For Summary Judgment is **GRANTED**.

QUALIFIED IMMUNITY

Qualified immunity shields government officials from individual liability for performing discretionary functions unless their conduct violates clearly established statutory or constitutional rights of which a reasonable

person would have known. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 532-33 (5th Cir. 1997), citing, *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982).

A qualified immunity test is analyzed under a two-step process. First, a *threshold* inquiry is made by the court to determine whether a public official's conduct deprived a plaintiff of a "clearly established" constitutional or statutory right. *Coleman*, 113 F.3d at 532, citing, *Harlow*, 102 S. Ct. at 2738. If so, the court must next consider whether the defendant's conduct was "objectively reasonable." However, in *Siegert v. Gilley*, 111 S.Ct. 1789, 1792-93 (1991), the Court emphasized that if the plaintiff has not sufficiently alleged the violation of a clearly established constitutional right, the inquiry ends at the first step, and the claim must be dismissed. "This two-part test sits atop a firm policy foundation. Foremost among these policy considerations is the deterrent effect that civil liability may have on the willingness of public officials to fully discharge their professional duties." *Sanchez v. Swyden*, 139 F.3d 464, 467 (5th Cir. 1998).

CLEARLY ESTABLISHED

In order to establish the violation of a clearly established right, the constitutional right must be sufficiently clear to put a reasonable person on notice that certain conduct violates that right. *Sanchez*, 139 F.3d at 466. "The Supreme Court has warned against vague or general assertions of constitutional rights and has required a § 1983 plaintiff to state with specificity the constitutional right that has been allegedly violated – otherwise, liability could be imposed in every case." *Id.* "The federal

courts of appeal have taken an especially strict approach to determining whether a constitutional right is cognizable," thus resolving any doubts in the law against plaintiff asserting a civil rights claim. *Id.* "[A] constitutional violation does not occur every time someone feels that they have been wronged or treated unfairly." *Id.*, quoting, *Shinn v. College Station Indep. Sch. Dist.*, 96 F.3d 783, 786 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1695 (1997).

Dr. Pastorek alleges that Chancellor Trail violated his constitutional right (a) to procedural due process, (b) to substantive due process, (c) to free speech and (d) in that Chancellor Trail was involved in a conspiracy to terminate Dr. Pastorek that violated his rights under §§ 1983 and 1985.

a. Procedural due process

Plaintiff alleges that he was denied due process because he was denied an opportunity to respond to "the reasons which actually motivated Dr. Trail to terminate Dr. Pastorek," including false, undisclosed information provided secretly to Chancellor Trail by Dr. Elkins.

In *Levitt v. University of Texas*, 759 F.2d 1224, 1227 (5th Cir. 1985), the Fifth Circuit outlined the due process protections a tenured professor is to entitled before he may be dismissed. A tenured professor is entitled to: "(1) be advised of the cause for his termination in sufficient detail so as to enable him to show any error that may exist; (2) be advised of the names and the nature of the testimony of the witnesses against him; (3) a meaningful opportunity to be heard in his own defense within a reasonable time; and (4) a hearing before a tribunal that

possesses some academic expertise and an apparent impartiality toward the charges." *Id.* at 1227. Even if a university fails to follow its own rules, there is no constitutional violation if it nevertheless gave the tenured professor all the process to which he was entitled under the Constitution. *Id.*

The defendants have established that Chancellor Trail ensured that Dr. Pastorek received all process due him throughout the termination process. As chancellor, Dr. Trail received a complaint against Dr. Pastorek from the Chairman of the medical school's Department of Obstetrics and Gynecology which required investigation. In this process, Chancellor Trail followed the handbook guidelines governing disciplinary actions of tenured faculty, and approved the implementation of additional steps and clinical reviews to ensure a fair and impartial review process and to extend to Dr. Pastorek every opportunity for him to clear himself of these charges.

The record further indicates that Chancellor Trail ensured that Dr. Pastorek was given notice of all termination hearings, that Dr. Pastorek had time to prepare for the hearings and that Dr. Pastorek was given every opportunity to contest the evidence and present a defense. In addition, Dr. Pastorek was apprised by Chancellor Trail of his right to appeal every hearing decision. Dr. Pastorek took advantage of every opportunity, but lost. Chancellor Trail weighed all of the evidence presented over the lengthy termination hearings and appeals and made a decision to terminate Dr. Pastorek's employment. Dr. Pastorek has made no showing that he was terminated because of false, undisclosed information provided secretly to Chancellor Trail by Dr. Elkins. Plaintiff

has also failed to substantiate his allegations that Chancellor Trail was somehow biased against plaintiff, or that the procedures that Chancellor Trail followed during the termination process in any way violated plaintiff's procedural due process rights. Plaintiff's procedural due process claims against Chancellor Trail are dismissed.

b. Substantive due process

Plaintiff alleges that he "possesses, by virtue of his tenure, the right to hold his faculty position unless an actual cause for discharge exists."

The Fifth Circuit has held that "To succeed with a claim based on substantive due process in the public employment context, the plaintiff must show two things: (1) that he had a property interest/right in his employment, and (2) that the public employer's termination of that interest was arbitrary or capricious." *State of Texas v. Walker*, 142 F.3d 813, 818 (5th Cir. 1998). The court assumes Dr. Pastorek's right to continued employment as a tenured professor is a property right protected by the Fourteenth Amendment. *Levitt v. University of Texas*, 759 F.2d 1224, 1231 (5th Cir. 1985). However, for the reasons discussed above, plaintiff has failed to show that Chancellor Trail's actions in terminating him were arbitrary or capricious.

"Both the Supreme Court and [the Fifth Circuit] have held . . . that substantive due process requires only that public officials exercise professional judgment, in a non-arbitrary and noncapricious manner, when depriving an individual of a protected property interest. *Walker*, 142 F.3d at 818. Having reviewed the record, the court cannot

conclude that Chancellor Trail's decision to terminate Dr. Pastorek "so lacked a basis in fact that [his] decision to terminate him was arbitrary, capricious, or taken without professional judgment." *Id.* ("At best, one might argue that reasonable minds could disagree on the propriety of [a professor's] termination, and that is insufficient to defeat a public official's qualified immunity."). Plaintiff's substantive due process claims against Dr. Trail are dismissed.

c. Free speech

The essence of Dr. Pastorek's free speech claim is contained in paragraph 9 of his "Petition for Damages" and in paragraphs 12 and 33 of the "Amended Petition for Damages."[3] Plaintiff's free speech claims focus

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[3] Paragraph 9 of the "Petition for Damages" and 33 of the "Amended Petition for Damages" reads:

> Defendants' malice is further established by their threats of retaliation, and actual retaliation against Dr. Pastorek for refusal to fabricate testimony against another physician who was undergoing a peer review proceeding. Defendant Elkins told Dr. Pastorek that unless he fabricated testimony against another physician, that he, Elkins, would institute proceedings to fire Pastorek from LSU. Defamatory remarks were published in that process and also outside of the termination proceedings.

Paragraph 12 of the "Amended Petition for Damages" reads:

> In February of 1995 Defendant Elkins threatened Dr. Pastorek with retaliation if Dr. Pastorek did not give false and misleading testimony in a peer review proceeding at East Jefferson Hospital. When Dr. Pastorek refused to give false testimony, Defendant

exclusively on allegations plaintiff makes against Dr. Elkins, which plaintiff now seeks to impute to Chancellor Trail as Dr. Elkins' supervisor. Claims for alleged discriminatory conduct by Dr. Elkins may not be imputed to Chancellor Trail. "[I]t is firmly established that individual liability . . . may not be predicated on the vicarious liability doctrine of *respondeat superior*. Only the direct acts or omissions of government officials, not the acts of subordinates, will give rise to individual liability under § 1983." *Coleman*, 113 F.3d at 533. Because plaintiff's First Amendment claims only involve the actions of Dr. Elkins, they are dismissed as to Chancellor Trail.

d. Conspiracy

Dr. Pastorek alleges that his termination was a result of a larger scheme or conspiracy devised by Dr. Elkins that involved Chancellor Trail, (and everyone else involved in the review process), to terminate his employment in retaliation for plaintiff's refusal to cooperate.

The Fifth Circuit has recognized that § 1983 plaintiffs may assert conspiracy claims. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1186 (5th Cir. 1990). "A conspiracy by itself, however, is not actionable under section 1983." *Id.* In *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 84 S.Ct. 489 (1964), the Fifth Circuit stated: "Of course, for a claim under section 1983, a conspiracy as such is not an indispensable element as it is under § 1985. But it may be charged as the legal mechanism through

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Elkins threatened Dr. Pastorek with retaliation, including institution of disciplinary proceedings.

which to impose liability on each and all of the Defendants without regard to the person doing the particular act." *Id.* at 126. Thus, a conspiracy claim is not actionable without an actual violation of section 1983. *Pfannstiel,* 918 F.2d at 1186. As plaintiff has not met his burden of showing that Chancellor Trail's role in plaintiff's termination process violated any clearly established constitutional or statutory right, plaintiff's conspiracy claim is not actionable.

Plaintiff's conspiracy claims under 42 U.S.C. § 1985 must also be dismissed. Plaintiff alleges that he was terminated because of false information secretly provided to Chancellor Trail by Dr. Elkins. Plaintiff has failed to show that he is a member of a protected class and that a conspiracy was motivated by racial or otherwise class-based invidious discrimination, for the purpose of depriving him of equal protection under the law. *Brotherhood of Carpenters v. Scott,* 103 S.Ct. 3352, 3359 (1983).

Dr. Pastorek has failed to make any showing that Chancellor Trail personally violated any clearly established constitutional or statutory right due plaintiff. Only in the most exceptional cases will government actors have no shield against claims brought against them in their individual capacities. This is clearly not one of those exceptional cases.

OBJECTIVELY REASONABLE

Because the court has found no violation of a clearly established right, it is unnecessary for the court to proceed to the second part of the two-step qualified immunity inquiry, i.e., whether the official's conduct was

objectively reasonable even though the conduct violated a person's civil rights.

Chancellor Trail is entitled to qualified immunity as to the claims brought against him individually. Defendant's Motion for Summary Judgment to dismiss the claims brought individually against Chancellor Trail is **GRANTED**.

New Orleans, Louisiana, this 10 day of February 1999

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT
JUDGE

(2)

Supreme Court, U.S.
FILED
JUN 1 2001
OFFICE OF THE CLERK

No. 00-1639

In The

Supreme Court of the United States

JOSEPH G. PASTOREK, II, M.D.,

Petitioner,

v.

MERVIN L. TRAIL, M.D., ALLEN COPPING, D.D.S., THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, CAROLYN ELKINS, SURVIVING SPOUSE AND EXECUTRIX OF THE ESTATE OF THOMAS E. ELKINS, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF FACTS

This matter stems from a review of the clinical practice of Dr. Joseph Pastorek at facilities owned and operated by the LSU Medical Center in New Orleans. Specifically, LSU reviewed nineteen individual cases called to its attention by its department chair, Dr. Thomas Elkins, and by Pastorek's immediate supervisor, Dr. Harvey Gabert. All the cases under review by LSU were patients referred to Dr. Pastorek by a community practitioner, Dr Annelle Blanchard, with whom petitioner had been involved in a lengthy extra-marital affair. The gravamen of the complaint by Drs. Elkins and Gabert was that petitioner had repeatedly performed high-risk obstetric consultations which had provided Dr. Blanchard the perinatal supervisory support to perform diagnostic therapeutic and surgical procedures without acceptable documented indications.

In the course of a lengthy and detailed review by a specially appointed *ad hoc* committee, it was decided to engage Dr. Gary Cunningham of the Southwestern Medical Center at Dallas to review petitioner's practice in regard to the cases at issue. The lower court found:

> The August 21, 1995 report by Dr. Cunningham concluded that plaintiff had engaged in "some very questionable obstetrical practices:"
>
> > After careful review of these documents, I conclude that Dr. Pastorek indeed engaged in some very questionable obstetrical practices. These center around the use of tocolytics in pregnancy before 20 weeks, and in some cases, in the first trimester. There is

> implicit approval of HUAM (home uterine activity monitoring) and subcutaneous terbutaline therapy given by pump in some of these woman (sic). There is also implicit approval of an inordinate number of cervical cerclage done by a community practitioner and it is difficult for me to believe that Dr. Pastorek was not aware of these excessive procedures.

App. 28-29.

Beyond the Cunningham review, LSU's Chancellor, Dr. Mervin Trail, authorized yet another independent, outside review, this time by the American College of Obstetricians and Gynecologists (ACOG). The lower court found:

> After reviewing the charges and interviewing ten individuals, the ACOG team found that of the nineteen cases reviewed, two clearly represented a level of care which fell beneath acceptable standards both in terms of management and in documentation of medical records. Only one case was found satisfactory by the team in both management and documentation. The remaining sixteen cases were considered unsatisfactory because of the lack of adequate medical record documentation.

App. 30.

Neither Dr. Cunningham nor the ACOG panel considered anything even remotely related to any issue regarding whether Pastorek could or should testify, in any regard, to any panel at East Jefferson General Hospital ("EJGH").

The peer review proceeding to which Dr. Pastorek refers in his petition had absolutely no bearing on LSU's decision to terminate Pastorek's employment. That proceeding was conducted at EJGH and centered around the obstetrical practice of Dr. Annelle Blanchard and of her inordinately high rate of cervical cerclage surgery. That extensive review process culminated in five days of hearings which commenced on January 3, 1995.[1] The EJGH review resulted in the termination of Dr. Blanchard's privileges at EJGH.[2]

In August of 1993, during the initial stages of the EJGH review, petitioner requested that Dr. Elkins review a number of Dr. Blanchard's patient charts. Dr. Elkins enlisted the aid of another LSU professor, Dr. Joseph Crapanzano,[3] to assist him in the review of Dr. Blanchard's charts. Drs. Elkins and Crapanzano determined that Dr. Blanchard's practices regarding cerclage surgery and her prescription of Home Uterine Activity Monitors and terbutaline pumps to allegedly "high-risk" pregnant patients was "out of step with expected obstetrical practice . . . . "[4] Dr. Elkins then learned that Dr. Pastorek had served as Dr. Blanchard's perinatal consultant on a majority of the cases which he and Dr.

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[1] EJGH hearings were held on January 3rd, 5th, 17th, 26th and February 16th, 1995.

[2] EJGH hearing transcript, Sealed Exhibit 107 to Doc. # 397, R. 0324.

[3] Dr. Joseph Crapanzano was, at that time, a member of the LSU OB-Gyn faculty for over thirty-five (35) years.

[4] Exhibit F (Supp.R. 0125); the affidavit of Dr. Crapanzano referencing the subject report of Drs. Elkins and Crapanzano & Exhibit G/Appendix; Supp.R. 0126.

Crapanzano had reviewed.[5] Dr. Elkins had become aware that Dr. Blanchard was referring patients allegedly requiring monitors and pumps to a company in which she held an ownership interest.[6] Dr. Elkins also became aware that Dr. Pastorek had been involved in an extra-marital affair with Dr. Blanchard since 1984.[7]

Drs. Elkins and Gabert instructed Dr. Pastorek to stop providing perinatal consultations for Dr. Blanchard on at least five (5) separate occasions, commencing in December of 1993.[8] At the direction of Dr. Robert Daniels, then Dean of the LSU School of Medicine, Dr. Elkins requested that Dr. Pastorek resign from the LSU faculty in December of 1993.[9] Dr. Pastorek refused to resign.

In the Fall of 1994, Dr. Crapanzano notified Dr. Elkins that EJGH was requesting that an LSU physician testify at the EJGH hearings involving Dr. Blanchard.[10] Dr. Elkins had also been informed that Dr. Pastorek had allegedly

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[5] Dr. Elkins' deposition of May 11, 1998 (Exhibit B; Supp.R. 0054), page 131, line 19-page 132, line 18.

[6] Dr. Elkins' deposition of May 11, 1998, pages 204-205; Exhibit B; Supp.R. 0054.

[7] Dr. Pastorek's deposition of 01/18/99, p. 66, 67, 70; Exhibit P *in globo*; Supp.R. 0150.

[8] Dr. Gabert's deposition of 3/9/98, pages 277-278, 284 (Exhibit I; Supp.R. 0128); Dr. Elkins' deposition of May 11, 1998, pages 134, 137-138; (Exhibit B; Supp.R. 0054).

[9] Standing Appeals Committee, Dean Daniels, Vol. I, pages 181-183; Exhibit C, Supp.R. 0115.

[10] Dr. Crapanzano's testimony, Ad Hoc Committee hearing, Vol. I, page 358; (Sealed Exhibit A to Doc. # 393).

co-managed the patients under review in the EJGH proceeding.[11] On February 7, 1995, Dr. Elkins had a meeting with Dr. Pastorek which Dr. Pastorek secretly tape-recorded. Citing a portion of that conversation, which transcript Dr. Pastorek introduced into the record of these proceedings, Dr. Pastorek alleged in his amended complaint that "Dr. Elkins threatened [him] with retaliation via termination procedures if [he] did not give false and/or misleading testimony in a peer review proceeding . . . ."[12]

After reviewing Dr. Pastorek's transcript of that conversation, the District Court dismissed his First Amendment claim finding as follows:

> Dr. Pastorek's free speech claim is refuted by the evidence presented by him in support of the claim. The transcript of the February 1995 telephone conversation between Dr. Elkins and Dr. Pastorek, secretly recorded by Dr. Pastorek, shows that Dr. Elkins discussed the ongoing trouble presented by Dr. Pastorek's prior documented support of Dr. Blanchard's marginal medical practices, and that Dr. Elkins asked if Dr. Pastorek thought Dr. Blanchard could be persuaded to admit her mistakes and accept some kind of probationary status. Dr. Elkins also urged that Dr. Pastorek reassess his support of Dr. Blanchard's practices and to concede that his support for her was "misguided" in light of the potential risks to LSU and to Dr. Pastorek's own

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[11] Exhibit O (Supp.R. 0147); Dr. Pastorek's deposition of 1/18/99; pages 239, 240; Exhibit P, *in globo;* Supp.R. 0150.

[12] Plaintiff's Amended Complaint, ¶ 11.

> career and reputation. There is no support for the claim that Dr. Elkins asked Dr. Pastorek to "fabricate testimony."

App. 21.

Thus, the only evidence Dr. Pastorek presented in support of his First Amendment claim was flatly rejected by the District Court as providing "no support" for that claim.

In February of 1995, Dr. Elkins learned that Dr. Pastorek had recently consulted an additional fifteen (15) patients of Dr. Blanchard's despite Dr. Elkin's directives. Dr. Elkins, at the direction of Dean Daniels, again demanded that Dr. Pastorek resign from the LSU faculty or face termination proceedings. When Pastorek again refused, Drs. Elkins and Gabert commenced the faculty termination proceedings.

Dr. Pastorek alleges that he was terminated for refusing to "recant" his consultations for Dr. Blanchard at the EJGH peer review hearings, which Dr. Pastorek mischaracterizes as a "state hearing tribunal." However, the record is clear that Dr. Pastorek's perinatal consultation in support of Dr. Blanchard's financially-motivated, substandard medical practices was the actual reason for the charge letter authored by Drs. Elkins and Gabert which initiated the faculty termination process. Dr. Pastorek was terminated from LSU after extensive and exhaustive proceedings (lasting more than 2 years) established that his consultations for Dr. Blanchard were below acceptable standards of care.

It is uncontroverted that Dr. Pastorek kept completely secret from LSU his involvement as a co-author of

a manuscript generated by a "Research and Development Agreement" between Dr. Blanchard and Healthdyne Perinatal Services, yet another HUAM and terbutaline pump provider.[13] Dr. Pastorek admitted that he was aware that Dr. Blanchard was to receive compensation for the Healthdyne research agreement.[14] Neither Dr. Blanchard nor Dr. Pastorek ever disclosed to LSU, EJGH or the patients enrolled ~~in the~~ purported "study" the existence of the research agreement with Healthdyne.[15] Dr. Pastorek never exposed to professional scrutiny his alleged "true opinion" regarding the "early and aggressive use" of the terbutaline pump or the use of such expensive equipment as a "first line therapy." The Perinatology Department at LSU was unanimous in its criticism of Dr. Blanchard's harmful medical practices, which Dr. Pastorek's consultations made possible. Dr. Pastorek was properly terminated from LSU for his role in providing eighteen substandard perinatal consultations for Dr. Blanchard.[16]

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[13] Dr. Pastorek's deposition of 1/18/99, page 207, line 22 & page 208, line 12; Exhibit P, *in globo;* Supp.R. 0150.

[14] Dr. Pastorek's deposition of 1/18/99, page 175, line 5-page 178, line 3; Exhibit P, *in globo;* Supp.R. 0150.

[15] Exhibit Y, Supp.R. 0187; Dr. Pastorek's deposition of 1/18/99, page 207, line 22; Exhibit P, *in globo;* Supp.R. 0150.

[16] ACOG Report, pages 5 & 6; Sealed Exhibit 11 to Doc. # 397, R. 0324.

Reason I.

THE WRIT SHOULD BE DENIED BECAUSE PETITIONER WAS NOT TERMINATED FOR ANY ISSUE INVOLVING SPEECH, BUT RATHER FOR CONDUCT INVOLVING SUBSTANDARD MEDICAL PRACTICE

Petitioner seeks to characterize his position as a challenge to his First Amendment freedom of speech. It is not speech which is at issue here but rather, it is *conduct* – the practice of medicine upon real women, with real babies, in real situations which LSU has sought to regulate.

LSU reviewed nineteen specific cases called to its attention by Dr. Elkins as department chairman. It was this laborious review by an *ad hoc* committee, by Dr. Gary Cunningham, an independent expert consultant, and by a panel of ACOG's experts which determined that petitioner's *practice*, not his speech, was substandard.

Respondents respectfully suggest that this petition does not raise any free speech issue recognized by *Connick v. Meyers;* 461 U.S. 138 (1983). Free speech cases addressed by the Court invariably involve instances in which a person's government employment is terminated as a direct result of conversation, usually involving criticism of the employment or the supervision. See *Waters v. Churchill,* 511 U.S. 661 (1994); *Pickering v. Board of Education,* 391 U.S. 563 (1988).

The record of the matter at bar reflects that Dr. Pastorek was not fired for any speech-related activity. The district court found that the complaint filed against Dr. Pastorek by Drs. Elkins and Gabert recommended termination proceedings to determine whether Dr. Pastorek

had engaged in conduct detrimental to his professional responsibilities on several grounds relating to his consultations for Dr. Blanchard. The complaint involved his failure to observe acceptable standards of medical practice.

The district court specifically found that Chancellor Trail's actions in terminating Dr. Pastorek's employment were not arbitrary, capricious, or taken without professional judgment. App. 39-40. In addressing the substantive due process claims brought by petitioner, the district court reviewed the record and made its conclusions based upon the fact that experts in obstetrical practice, Dr. Gary Cunningham and the ACOG panel, were both critical of Pastorek's consultative practice.

The state has a legitimate interest, through continuing supervision, in maintaining the quality of medical care provided within its facilities. *Bigelow v. Virginia*, 421 U.S. 809 (1975). See also, *Darlak v. Bobear*, 824 F.2d 1055 (5th Cir. 1987). This Court has long recognized that the state does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

The Fifth Circuit has recognized that reasonable restraints on the practice of medicine and professional action cannot be defeated by merely pointing to the fact that some communication is involved. *Daly v. Sprague*, 742 F.2d 896 (5th Cir. 1984). It appears beyond dispute that a state operated medical facility has the right, and indeed the duty, to regulate the conduct of its physicians

and limitations on professional medical conduct in the treatment of patients may necessarily affect the use of language. Reasonable restraints on the practice of medicine cannot be defeated by pointing to the fact that communication is involved. *Garcia v. Texas State Board of Medical Examiners*, 384 F. Supp. 434 (W.D. Tex. 1974), *affirmed*, 421 U.S. 995 (1975).

The circuit court found here that Dr. Pastorek was terminated because of his performance as a physician and any speech that may have been affected was incidental to the valid and reasonable regulation of his conduct as a physician. Both lower courts found sufficient evidence of adequate justification for Pastorek's termination based on his substandard practice in treating patients seen in consultation for Dr. Blanchard.

Neither of the courts below found, as Dr. Pastorek would have this court believe, that he was terminated because of any appearance or lack of appearance before EJGH. Dr. Pastorek was discharged by the Chancellor as a result of an extensive and thoughtful review of his practice as a consulting physician. There is absolutely no evidence to support a conclusion that Pastorek's speech, or lack of speech, before a third party hospital reviewing the privileges of Dr. Blanchard had any bearing on the reason for Pastorek's termination from LSU's faculty.

Reason II.

THE WRIT SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT DID NOT HOLD THAT QUALIFIED IMMUNITY APPLIES TO A REQUEST FOR INJUNCTIVE RELIEF

The Fifth Circuit did not hold, as petitioner suggests, that qualified immunity bars petitioner's request for injunctive relief. Instead, the Fifth Circuit found that defendants did not violate any of petitioner's constitutional rights in terminating his employment. App. 7. Without a showing of unconstitutional conduct, the individual defendants were entitled to the dismissal of petitioner's claims against them for damages in their personal capacities (under the doctrine of qualified immunity), as well as to the dismissal of petitioner's claim for injunctive relief. Without a constitutional violation, there was simply no conduct to enjoin.

Petitioner sought injunctive relief (*i.e.*, reinstatement) against Trail in his official capacity and against the Board of Supervisors. Injunctive relief against the Board of Supervisors, a state agency, was properly denied on the basis of Eleventh Amendment immunity.[17] *Cory v. White*, 457 U.S. 85, 91 (1982). Trail defended on the grounds that he had not violated petitioner's constitutional rights and, thus, petitioner's claims against him for damages in his personal capacity and for injunctive relief in his official capacity should be dismissed.

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[17] Petitioner has not sought review of the Board's dismissal.

In analyzing whether the individual defendants were entitled to qualified immunity on the personal capacity claims,[18] the Fifth Circuit first looked to whether petitioner had sufficiently alleged a violation of his constitutional rights.[19] The Fifth Circuit analyzed the merits of each of petitioner's alleged constitutional violations: (1) procedural due process; (2) substantive due process; (3) free speech; and (4) conspiracy to violate civil rights, and found each to be lacking in merit. App. 8-13. As a result, there was no need to reach the issue of whether the constitutional rights alleged were "clearly established" or whether defendants' conduct was "objectively reasonable." As succinctly stated by the District Court, petitioner's failure to prove a constitutional violation, not the application of qualified immunity, defeated his claims:

> In the present case, after discovery and after considering the plaintiff's summary judgment evidence, there simply is no evidence material to any constitutional violation. Thus, the case can be dismissed without addressing whether the law allegedly violated was "clearly established" or whether the defendant's conduct was "objectively reasonable" in light of the law.

App. 24.

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[18] Petitioner sued Elkins for damages in his personal capacity but not for injunctive relief.

[19] In *Siegert v. Gilley*, 500 U.S. 226, 231 (1991), this Court emphasized that the threshold inquiry in a qualified immunity analysis is whether the plaintiff has sufficiently alleged the violation of a clearly established constitutional right.

The Fifth Circuit correctly concluded its qualified immunity analysis once it determined that defendants had not violated any of petitioner's constitutional rights. That finding necessarily barred petitioner's claim for injunctive relief.[20] Accordingly, review by this Court is unnecessary.

Reason III.

THE HOLDING IN *MONELL V. DEPARTMENT OF SOCIAL SERVICES*, 436 U.S. 658 (1978), THAT COMMON LAW PRINCIPLES OF *RESPONDEAT SUPERIOR* DO NOT APPLY TO ACTIONS UNDER 42 U.S.C. § 1983, IS NOT AT ISSUE IN THIS CASE, BUT IS NONETHELESS VALID

In *Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978), this Court held that the doctrine of *respondeat superior* liability is inapplicable in § 1983 civil rights actions. This Court should deny petitioner's request to overrule *Monell* if for no other reason than because such a reversal would not affect the outcome of this case. Petitioner argues that Chancellor Trail should be held liable under the theory of *respondeat superior* for the alleged First Amendment retaliatory motive of Elkins. Any such claim for *respondeat superior* liability would have to be brought against Trail, a state employee, in his official

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[20] Obviously, the result would be different if the Fifth Circuit had found that defendants had violated petitioner's clearly established constitutional rights, but their conduct was objectionably reasonable. Under that scenario, qualified immunity would have precluded petitioner's claim for damages against the individual defendants in their personal capacities but not his claim for injunctive relief.

capacity. However, in *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989), this Court held that a state employee acting in his official capacity is not a "person" subject to liability under § 1983. Thus, the only possible claim under petitioner's theory of *respondeat superior* liability would be one for injunctive relief against Trail. And, as argued above, without a constitutional violation, there can be no claim for injunctive relief. Under these facts, the principle of *respondeat superior* liability is inapplicable.

Irrespective of the foregoing, there are many other obvious reasons why this Court should refuse to overrule the long-standing and often-cited rule in *Monell* that *respondeat superior* liability does not apply in § 1983 actions. This holding is based on the legislative history of § 1983, the plain language of the statute, and constitutional concerns about the nature of *respondeat superior* liability. In addition, this Court has recently considered and rejected an attempt to overrule this fundamental holding of *Monell* in the case of *Board of County Commissioners v. Brown*, 420 U.S. 397 (1997). Finally, despite petitioner's claim to the contrary, 42 U.S.C. § 1988(a) is inapplicable, as federal law is not deficient as to employer liability under § 1983. For all these reasons,

petitioner's invitation to overrule *Monell* is without merit and should not be considered.

The literal language of the statute argues against imposing *respondeat superior* liability. § 1983 allows an action against any "person" who "subjects [a person], or causes [that person] to be subjected," to a deprivation of federal rights. 42 U.S.C. § 1983. This Court correctly determined in *Monell* that this statutory language precluded the application of *respondeat superior* liability, because under this common law theory of strict liability, the employer of the alleged tortfeasor did not "cause" any deprivation of rights. *Monell*, 436 U.S. at 692.

In holding that *respondeat superior* is not applicable to § 1983 civil rights actions, this Court examined the Civil Rights Act of 1871, specifically the Sherman Amendment, which attempted to impose vicarious liability on municipalities for the acts of its citizens. *Id.* at 692, n.57. The defeat of the only amendment to § 1983 and its predecessors that concerned vicarious liability allowed this Court to conclude that there was a strong inference against imposing other forms of vicarious liability, including the state doctrine of *respondeat superior*.

In addition, this Court was correctly concerned about the constitutionality of the *respondeat superior* doctrine. There were, and still are, concerns that *respondeat superior* liability is unconstitutional because it holds a person liable based solely on their relationship with another. *Id.* at 693. This Court held that these concerns led to the defeat of the Sherman Amendment and Congress's use of statutory language precluding the doctrine. *Id.* at 693-94. Therefore, for sound statutory and policy reasons, all of

which remain valid, this Court properly found that *respondeat superior* liability was unavailable in § 1983 actions.

Finally, 42 U.S.C. § 1988(a) is inapplicable because, as explained above, the language of § 1983 adequately addresses the issue of employer liability. The purpose of 42 U.S.C. § 1988(a) is to apply state law as a gap-filler where federal law is silent. The only two cases cited by petitioner on this issue applied state law only because federal law was completely silent on the issue. However, in *Wilson v. Garcia*, 471 U.S. 261, 269 (1985), this Court noted that § 1988 holds that "state law shall only apply 'so far as the same is not inconsistent with' federal law." In this case, federal law is not silent and the application of *respondeat superior* liability would be inconsistent with statutory interpretation precluding this doctrine. Any reversal of this landmark holding would open the floodgates to unfounded liability for governmental entities that are already overburdened and underfunded. Petitioner's request for reversal of the *Monell* holding should be denied.

CONCLUSION

Respondents respectfully suggest that this case involves no issue upon which the Court should grant a writ of certiorari.

Respectfully submitted,

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